

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA
CASE NO.: 99-09

INQUIRY CONCERNING JUDGE
PATRICIA KINSEY,

SUPREME COURT CASE NO. 96,629

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**FINDINGS, CONCLUSIONS AND RECOMMENDATIONS BY THE
HEARING PANEL OF THE JUDICIAL QUALIFICATIONS COMMISSION**

The Hearing Panel of the Florida Judicial Qualifications Commission ("JQC") respectfully submits the following Findings, Conclusions and Recommendations pursuant to Article 5, § 12 (a)(1), (b) and (c) of the Florida Constitution.

Judge Patricia Kinsey, a County Judge of Escambia County, Florida was charged by the Investigative Panel of the JQC with certain violations of the Code of Judicial Conduct growing out of her election to the bench in the course of the 1998 election campaign in which she defeated the incumbent County Judge William Green.

Generally it was charged

¹ that candidate Kinsey engaged in an improper pattern of conduct by making pledges and promises of conduct in office which would favor law enforcement while at the same time asserting that the incumbent judge consistently ruled against law enforcement. It was also asserted that her statements committed her to a predisposition

¹ The Formal Charges are quoted in full in these Findings, Conclusions and Recommendations.

favoring victims and law enforcement and further that she made knowingly, false and misleading representations concerning her opponent whom she criticized as "Let 'Em Go Green." It was further asserted that she made comments regarding pending cases before Judge Green which might affect the outcome of those cases. It was asserted that her campaign materials intentionally lead the voters to believe that, as a judge, Patricia Kinsey would assist the police in placing criminals in jail while her opponent, Judge Green, routinely set them free.

The charges, alleging violations of Canons 1, 2, 3, and 7 were tried before the Hearing Panel which received testimony and documentary evidence in Pensacola, Florida on June 12 and 13, 2000. The Hearing Panel consisted of County Judge Harvey Goldstein and District Court of Appeal Judge James Jorgenson, attorneys Evett Simmons and John Frost, and lay members, Bonnie Booth and Nancy Mahon. Attorney John Beranek was counsel to the Hearing Panel. The Investigative/Prosecutorial Panel of the JQC was represented by attorneys Marvin Barkin, Lance Scriven and Tom MacDonald. Judge Patricia Kinsey was represented by her counsel, Mr. Roy Kinsey, who is also her husband. (T. 75).

The Amended Notice of Formal Charges of March 3, 2000, asserts 12 charges which are here quoted followed by the Hearing Panel's findings as to each. The findings indicated below were each

determined by at least a two-thirds vote of the six member Hearing Panel in accordance with Article 5 § 12(b) of the Florida Constitution and Rule 19 of the Judicial Qualifications Commission Rules. In the view of the Hearing Panel, each of these findings is supported by clear and convincing evidence in accordance with In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997); In re: Davey, 645 So. 2d 398, 404 (Fla. 1994); and In re: Ford-Kaus, 730 So. 2d 269 (Fla. 1999).

The charges and Panel findings are as follows:

CHARGE:

1. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i)-(ii), you distributed a piece of campaign literature entitled, "*Pat Kinsey: The Unanimous Choice of Law Enforcement For County Judge*" in which you stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong...behind bars," as opposed to simply pledging or promising the faithful and impartial performance of your duties in office. A true and correct copy of this campaign literature is attached hereto as Exhibit A. (Designated as JQC Exhibit 1 at the hearing).

PANEL FINDING:

1. Guilty as charged.

CHARGE:

2. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i)-(ii), you reiterated your commitment to the prosecution side of criminal cases by distributing a piece of campaign literature entitled, "*If You Are a Criminal, You Probably Won't Want to Read This*," in which

you stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong...behind bars!, as opposed to simply pledging or promising the faithful and impartial performance of your duties in office. A true and correct copy of this campaign literature is attached hereto as Exhibit B. (Designated as JQC Exhibit 2 at the hearing).

PANEL FINDING:

2. Guilty as charged.

CHARGE:

3. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i)-(ii), you distributed a similar piece of campaign literature entitled, "*Let's Elect 'Pat' Kinsey for County Judge,*" in which you reiterated that "a judge should protect victims' rights," and that judges must support "hard-working law enforcement officers by putting criminals behind bars, not back on our streets," as opposed to simply pledging or promising the faithful and impartial performance of your duties in office. A true and correct copy of this campaign literature is attached hereto as Exhibit C. (Designated as JQC Exhibit 3 at the hearing). At a minimum, statements of the nature of those identified in paragraphs 1, 2, and 3 erode public confidence in the integrity and impartiality of the judiciary and commit or appear to commit you with respect to issues that may come before the court.

PANEL FINDING:

3. Guilty as charged.

CHARGE:

4. During the campaign, in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i)-(ii), you made statements during an interview on a local radio station which exhibited a hostility or apparent hostility towards defendants in criminal cases. By way of example, the following colloquy occurred between you and a caller to the radio show on which you appeared:

Caller: [M]y question is mainly pertained to Pat Kinsey.
Do you believe that as a Judge, you would be able to

stand up there, uum, because I do know that **you are pro-law enforcement**, to be able to make a decision without any bias towards the defense or prosecution?

Pat Kinsey: **As a prosecutor, I am different from a defense attorney.** I am trained, and I am ethically obliged to look at a case, after an arrest has been made and make a determination, what is just? What is fair? What are the appropriate charges?...**This is something that is much different from what a defense attorney does.** Much like Bill Green before he went on the bench, he was a defense attorney, that type of attorney. He is trained, and he is with ethically obliged at that time to zealously advocate for his client. That is, do whatever he could, under the law, to get his client free. And that is why I think we have such a philosophical difference, between us. I think, in my opinion, that Judge Green is still in that defense mode. (emphasis added)

As evidenced by the caller's belief that you were "pro-law enforcement" coupled with: your i) failure to disavow the caller of your apparent bias towards law enforcement and; ii) attempt to portray the incumbent as "still in that defense-mode," you left the firm and definite impression that, as a judicial officer, you would be in a "prosecution mode" and not rule in an even-handed and impartial manner. A copy of a transcript from this radio interview is attached hereto as Exhibit D. (Designated as JQC Exhibit 8 at the hearing).

PANEL FINDING:

4. Not guilty as to "failure to disavow" but otherwise guilty as charged.

CHARGE:

5. During the campaign and in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canon 7(A)(3)(d)(i)-(ii), you made the deliberate attempt to cloak your candidacy in an umbrella of law enforcement and portray yourself as a "pro-prosecution/pro-law enforcement judge" by:

SS disseminating a brochure entitled "*Pat Kinsey: The Unanimous Choice of Law Enforcement for County Judge,*" a

copy of which is attached hereto as Exhibit A, in which you are shown in a group photograph with ten law enforcement officers;

SS stating in a brochure entitled, "*A Vital Message From Law Enforcement*," a copy of which is attached hereto as Exhibit E, that "victims have a right to **expect judges to protect them** by denying bond to potentially dangerous offenders" rather than stating that you would consider bond determinations fairly and impartially based on the circumstances of the particular case (emphasis added);

SS pledging in a brochure entitled "*The Alternative for County Judge*," a copy of which is attached hereto as Exhibit F, that you would "**bend over backward** to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them" (emphasis added);

SS highlighting in several of your campaign brochures, that you had the "unanimous support of law enforcement" and that "area police officers [had] unanimously endorsed Pat Kinsey for County Judge," thereby further reinforcing your alliance with law enforcement;

SS emphasizing in a brochure entitled "*If You Are a Criminal, You Probably Won't Want to Read This*," a copy of which is attached hereto as Exhibit B, that "**Above all else**, Pat Kinsey identifies with the victims of crime," and that "**Pat Kinsey believes a judge should protect the victims of crime**," rather than simply pledging the faithful and impartial performance of your duties without regard to holding defendants' or victims' interests of paramount importance (emphasis added);

SS stating during the aforementioned radio interview referenced in paragraph 4 hereof:

[you] work[ed] very closely with law enforcement officers as a prosecutor. And they're left begging for help. And all they see when they come to court is a Judge, like Bill Green, who either dismisses a case or minimizes it by not holding the criminals accountable... Somebody has to hold these crimes accountable. And that is why I am here.

SS further commenting during the same radio interview that:

I very much take exception to the fact that Mr. Green says he's not a Liberal. He very definitely is. And his record will show that. In fact, I invite you to talk with the law enforcement officers who have endorsed me unanimously... Look to see who they are supporting. Look to see who's[sic] campaign they are contributing to. And I think that will tell the story.

SS referring to the defendant as a "**punk**" in your campaign brochure entitled "*A Shocking Story of Judicial Abuse*," a copy of which is attached hereto as Exhibit G, thereby evidencing a certain hostility or bias towards defendants generally.

PANEL FINDING:

5. Guilty as charged of cloaking her entire candidacy in the umbrella of law enforcement and portraying herself as a future prosecution/pro-law enforcement judge while characterizing her opponent as dismissing criminals and not holding them accountable. The charge contains 8 different examples of similar conduct and these examples represent the basic theme of the entire judicial campaign by Judge Kinsey. (T. 87, 88, 92, 100, 101, 151, 373, 379).

CHARGE:

6. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(9), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i)-(iii), you knowingly misrepresented in your campaign brochure entitled, "*A Vital Message From Law Enforcement*," the record facts concerning the defendant's appearance before the incumbent for bond consideration in *State v. Alsdorf*, Case No. 98-2993, including the

false statement that the defendant had been "released...into our community," when, in fact, the defendant had not been released into the community. A true and correct copy of this campaign literature reflecting this false statement is attached hereto as Exhibit E. (Designated as JQC Exhibit 4 at the hearing).

PANEL FINDING:

6. Judge Kinsey is found not guilty of this specific charge. The charge is based on JQC Exhibit 4, where Kinsey was accused of "knowingly" making "the false statement that the defendant" (Alsdorf) "had been released into our community..." Although Kinsey is found not guilty of this particular allegation from JQC Exhibit 4, she is found guilty of other charges stemming from the same piece of campaign material.

CHARGE:

7. During the campaign, in violation of Canon 1, Canon 2(A), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i)-(iii), you knowingly misrepresented in your campaign brochure entitled, "*A Shocking Story of Judicial Abuse*," that your opponent, the incumbent, had not revoked Grover Heller's bond at an emergency bond hearing when, in fact, he had revoked the defendant's bond. You further implied that your opponent's role in that case was to protect "an elderly law-abiding couple" and that the incumbent's conduct represented a "shocking lack of compassion for the victims of violent crime." A true and correct copy of this campaign literature is attached hereto as Exhibit G. (Designated as JQC Exhibit 5 at the hearing).

PANEL FINDING:

7. Guilty in part. The Panel finds guilt on the first part of this charge in that candidate Kinsey made a knowing misrepresentation concerning the bond revocation but not guilty as

to the charge of "implying" a shocking lack of compassion for the victims. This charge was based on Exhibit 6 "*A Shocking Story of Judicial Abuse*" which concerned Judge Green's rulings on the Grover Heller bond.

CHARGE:

8. During the campaign, in violation of Canon 1, Canon 2(A), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i)-(iii), you knowingly misrepresented in a radio advertisement the incumbent's role in the Grover Heller matter by omitting crucial facts relevant to an accurate portrayal of the incumbent's conduct and by giving listeners the false impression that the incumbent took no action to protect an elderly couple from domestic violence. (The tape was played during the hearing and a placard showing the text was exhibited and is a part of the record).

The radio advertisement stated as follows:

What kind of man would beat up his own mother? Meet Grover Heller. He was arrested for battery after he grabbed his 63-year-old mother, slammed her against a door and beat her with his fists, sending her to the hospital. Incredibly, County Judge William Green released this thug the very next day. The son then threatens to kill his parents. The frightened couple asked Judge Green to have their son arrested. What did Judge Green do? He offered to put the elderly couple in jail. You heard right.

Instead of jailing the abusive son, Judge Green offers to put the elderly parents in jail. When asked by reporters, why? Judge Green said he was testing them to see if they were really afraid. Since when does a law abiding couple need to be tested by a county judge who is supposed to protect them. Sick of this kind of justice? Then vote no on Judge William Green, Tuesday, September 1st.

Paid political advertisement, paid for and approved by Patricia Kinsey campaign nonpartisan.

PANEL FINDING:

8. Not guilty. Although the Panel finds Judge Kinsey guilty of other aspects of the Grover Heller matter under charge 7, the Panel concluded this separate charge concerning the same controversy should not be sustained as an additional charge. This was a 60 second radio spot and did not have to contain the full facts of the controversy.

CHARGE:

9. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(9), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i)-(iii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement*," you knowingly misrepresented the nature and seriousness of criminal charges which were pending in *State v. Johnson*, Case No. 97-4302, by giving the false and misleading impression that the defendant had been charged with attempted murder and burglary at the time of his appearance for bond consideration when, in fact, no such charges were pending at the time. Your campaign literature also stated that in a restraining order in the case, the defendant is quoted as having told the victim, that he would kill her "just like I buried that bitch in Mississippi," when, in fact, there is no such language in the restraining order. A true and correct copy of this campaign literature is attached hereto as Exhibit E.

PANEL FINDING:

9. Guilty of making a knowing misrepresentation as to the seriousness of the criminal charges which were pending in State v. Johnson. Not guilty as to the quoted matter attributed to the defendant in the later part of this charge. This language came

from a bond hearing rather than from a restraining order but the Hearing Panel does not find this to have been a knowing misrepresentation.

CHARGE

10. During the campaign, in violation of Canon 1, Canon 2(a), Canon 3(b)(5), Canon 3(b)(9), Canon 7(A)(3)(d)(ii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement*," you publicized the details of the pending cases of two criminal defendants, Stephen Johnson and Gerard Alsdorf, to the public in a manner that could affect the outcome or impair the fairness and integrity of those proceedings. A true and correct copy of this campaign literature is attached hereto as Exhibit E.

PANEL FINDING:

10. Guilty as charged.

CHARGE:

11. During the campaign, in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canon 7(A)(3)(d)(iii), in your campaign brochure entitled, "*A vital Message From Law Enforcement*," you knowingly misrepresented the incumbent as Judge "Let 'em Go" Green, who consistently ignored the pleas of police officers, prosecutors and victims to keep potentially dangerous individuals off the streets. A true and correct copy of this campaign literature is attached hereto as Exhibit E.

PANEL FINDING:

11. Not guilty. Although use of "Let 'Em Go Green" was inappropriate in the view of the Hearing Panel, there was unrebutted evidence that this nickname was commonly used by law enforcement members in regard to Judge Green. (T. 102-4, 373, 397, 444). The Panel also notes that although available, the former

Judge Green was not called to testify by the Investigative Panel. There was no evidence offered to rebut Judge Kinsey's assertions of Judge Green's inappropriate conduct in his criminal cases.

CHARGE:

12. During the campaign, in violation of Canon 1, Canon 2(A) and Canon 7(A)(3)(a), you engaged in conduct unbecoming a candidate for and lacking the dignity appropriate to judicial office, which had the effect of bringing the judiciary into disrepute, by disseminating the statements set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, and affirmatively conveying the message that it is permissible for judges to rule in a predisposed manner in certain types of matters which may come before them. Such statements inappropriately attack the judicial system by conveying the false and misleading impression that a judge's role is to combat crime rather than judge those who appear before the court as criminal defendants in a fair and impartial manner. Moreover, by the breadth of your unsubstantial criticism, you diminished the public perception of the impartiality, independence and proper responsibility of the judiciary.

PANEL FINDING:

12. Guilty as charged as to Charges 1, 2, 3, 4, 5, 7, 9 and 10. Not guilty as to Charges 6, 8 and 11.

FINDINGS OF FACT
OVERVIEW

The following factual findings provide an overview of the case and the sequence of events leading to these proceedings. More specific findings as to the individual charges and the legal and ethical issues follow this overview.

The evidence presented was rarely in conflict and the basic facts were agreed upon including the campaign literature and the radio excerpts which were all exhibits to the charges. These exhibits which became the primary evidence were all stipulated into evidence. (T. 77). The prosecution's case consisted of two witnesses, Judge Patricia Kinsey (T. 72) and Judge Lacey Collier, a former Circuit Judge and current Federal District Judge. (T. 173).

Judge Kinsey generally testified that she presented herself as favoring law enforcement because that became the issue in the race due to Judge Green's job performance which was generally condemned by law enforcement. (T. 84, 87, 88, 92, 100, 101, 151). There was no disagreement by Judge Kinsey that she was responsible for all the campaign material. (T. 77). Judge Kinsey's position was that she was not bound by all the Canons governing judges because she was merely a candidate and further that her campaign constituted free political speech which was constitutionally protected under the First Amendment. (T. 18-21, 104, 131-2, 168). She believed that none of her materials violated any applicable Canon.

Judge Collier testified, without objection, that in his view the Kinsey campaign's extreme pro-law enforcement position was improper and unethical. (T. 176-184). He gave his opinion that the judiciary was to be independent and not to merely reflect the desires of the community. (T. 185-6).

Judge Kinsey presented 15 witnesses and over 200 affidavits attesting to her good character and skills as a sitting judge. This case does not concern any charge of or any evidence of misconduct by Judge Kinsey after her election to the bench. Judge Kinsey and her counsel argued and asserted that Canon 1 does not apply to judicial candidates and that various aspects of other Canons have no application to candidates. The Hearing Panel rejected this position at trial and herein finds violations of all of the charged Canons, including Canons 1, 2, 3, and 7. (T. 371).

Judge Patricia Kinsey graduated from law school in 1991 and presented herself as an intelligent individual and as having been, a competent assistant state attorney. She is married to an attorney, Roy Kinsey, who represented her at the hearing of this matter. (T. 75, 141). Upon graduation from law school she joined the State Attorney's Office in Pensacola. (T. 139). She decided very early that she wished to run for the County Court bench. (T. 126, 140).

Due to a perceived basic philosophical difference with Judge William Green's approach to criminal matters, she chose to run

against him. (T. 140, 148). An example of this philosophical disagreement was described by Judge Kinsey. (T. 147-8). As an assistant state attorney Kinsey believed she lost her cases too often before Judge Green. She discussed this with him and he assured her she was properly trying her cases. He also reportedly stated that if faced with only the testimony of a defendant and the testimony of a police officer "and that's all the evidence I have, I'm going with the defendant every time." (T. 148). Attorney Kinsey believed this was unfair to the police. Other assistant state attorneys testified to similar statements by Judge Green. (T. 311).

Patricia Kinsey was respected by the law enforcement community when she functioned as a prosecutor and many officers held Judge Green in low esteem. (T. 311, 373). The name "Let 'Em Go Green" was in common usage by the police. (T. 397). Police officers occasionally suggested that a case be nol prossed rather than go to court if the matter was assigned to Judge Green. (T. 63, 302-3). The law enforcement community perceived Patricia Kinsey as a likely candidate to run against Judge Green and the evidence was very strong that Patricia Kinsey was thought to be pro-police and very much in favor of the victims of crime. (T. 373-4, 386-390).

The campaign was managed by Mr. Roy Kinsey who's office staff assisted. Most of the day to day supervision and the designing of the campaign materials was done by political consultant Mr. James

Spearing of Tallahassee. (T. 372-3). Mr. Spearing had been in the business of running political campaigns for some 13 years and one of his major clients was the Police Benevolent Association which contacted Mr. Spearing to assist Patricia Kinsey in her campaign. (T. 373). He indicated that numerous law enforcement officers were complaining to him about how Judge Green handled criminal matters in his court. Although Mr. Spearing had never before handled a judicial campaign, he educated himself on the differences between a judicial campaign and a normal political campaign. (T. 375-6). There were briefings between Spearing, the candidate and Roy Kinsey in which they discussed the restrictions on judicial campaigns. (T. 375-6).

Mr. Spearing indicated that the last 18 days of any campaign is really the period of time which is crucial. (T. 379-381). He planned the Kinsey campaign so that the campaign brochures would arrive in the hands of the voters during the last 18 days in a prearranged series and build to a climax on the day before the election. (T. 379). This was done knowing full well that Judge Green would not have an opportunity for an effective response. In addition to the obvious time constraints, Judge Green could not comment on cases pending before him. Mr. Spearing wrote the brochures and faxed them to candidate Kinsey for her approval. (T. 380-1). The brochures were printed in Tallahassee and mailed from there. (T. 381). Mr. Spearing's fee for running the campaign was

\$15,000. (T. 398).

Mr. Spearing, campaign manager Roy Kinsey and candidate Kinsey were all well aware of the numerous restrictions placed upon judicial campaigns. (T. 141, 375). Mr. Roy Kinsey, acting on behalf of the candidate, attended a judicial elections seminar presented by District Judge Charles Kahn of the First District Court of Appeal. Both Spearing and candidate Kinsey were provided with the material furnished at that seminar and were fully aware of the Supreme Court's decision in In re: Alley, 699 So. 2d 1369 (Fla. 1997). They both stated that they attempted to comply with all of the restrictions on judicial campaigns. (T. 75, 141-2, 375-6, 382). Judge Kinsey stated that she viewed the Alley decision as the "bible" to guide the way in which she ran her campaign. (T. 75, 141).

The Hearing Panel concludes that the Alley decision involved election misconduct of a more egregious nature than the conduct charged against Kinsey. The Hearing Panel recognizes that Alley resulted in a stipulated public reprimand with a cautionary note by the Court that the penalty would have been more severe had the Court not been "constrained" by the stipulated recommendation of the JQC Investigative Panel for a public reprimand. The stipulated recommendation was the result of a JQC Rule 6(b) hearing and an evidentiary hearing never took place before the Hearing Panel. The distinctions between Alley and Kinsey are discussed in the

concluding section of these Recommendations.

Judge Kinsey did not retreat from any of her campaign brochure statements other than to admit two minor mistakes in regard to Exhibit 4 and to further indicate that she should not have used the words "thugs" and "punks" in one brochure. She said this was because these words were not a part of her own everyday vocabulary. (T. 120, 169). She also indicated that she was in a rush during the last 18 days of the campaign and that these words just slipped by. (T. 169). The Hearing Panel accepts the fact that the last 18 days of this campaign were high pressure days. However, the fact that this was a stressful and rushed time does not constitute an excuse for ethical violations. The Panel rejects last minute stress as an excuse for possible ethical violations in this case. Judge Kinsey had funding and professional assistance. She also won the race by a very substantial margin.

There was substantial evidence offered without objection which was critical of the then incumbent Judge Green. Although Judge Green was certainly not on trial, the Hearing Panel notes that he was not called to testify by the prosecution and thus much of the adverse evidence concerning Judge Green was unrebutted.

FINDINGS AND CONCLUSIONS AS TO SPECIFIC CHARGES

Charge 1 concerns JQC Exhibit 1. This brochure shows candidate Kinsey in the center of a large photograph surrounded by 10 heavily

armed police officers holding automatic weapons and wearing flack jackets. Above the picture is the legend "*Who do these guys count on to back them up?*" Patricia Kinsey was the obvious intended answer. The brochure noted that Kinsey was the "unanimous choice" of law enforcement and that she was "*tough as nails on criminals.*" This statement was immediately above a picture of Patricia Kinsey standing with two uniformed police officers holding police dogs. This "tough as nails on criminals" position was attributed to the future Judge Kinsey by the brochure.

Through this brochure, Judge Kinsey was telling the public that she would be very tough on crime and that she favored the police. Even Mr. Spearing admitted that the photograph of Kinsey among 10 armed police officers would have been improper had Kinsey worn a robe in the picture. (T. 433). The Hearing Panel, by clear and convincing evidence, finds that this brochure intentionally created and conveyed the message that Judge Kinsey would support the police if elected to the position of County Judge. The Panel also notes a basic unfairness in that no incumbent judge could have properly appeared in any similar posed photograph in campaign material.

The charging document states that Kinsey should have pledged only the performance of her duty of impartial justice under Canon 7(A)(3)(d)(i)(ii). This canon provides:

All Judges and Candidates

* * *

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. (emphasis supplied).

Although the Hearing Panel does not hold that only the words "faithful and impartial performance of the duties" may be used, the Panel does conclude that this campaign material went too far and constituted an ethical violation. Candidate Kinsey committed herself to a pro-police position on matters which she affirmatively stated would come before her on a daily basis as a judge. The Hearing Panel finds this brochure to be clear and convincing evidence that Judge Kinsey intended to convey her pro-police position to the voters.

In the overall context of this campaign, Judge Kinsey also told the voters that her opponent, Judge Green, was soft on criminals and did not protect victims and that she would do so by helping law enforcement put criminals in jail. This brochure committed Judge Kinsey to future conduct on matters she affirmatively stated would come before her for rulings. Obviously, the safe approach would have been to fully comply with Canon 7 and limit campaign pledges accordingly.

As to Charge 2, the campaign brochure in question was JQC Exhibit 2. The brochure is entitled "*If You Are a Criminal You Probably Won't Want to Read This!*" Candidate Kinsey was described as a "passionate advocate for victims" who "identifies with the victims of crime." The brochure notes that Kinsey had been "unanimously endorsed" by "area law enforcement officers" and that she had the endorsement of the Florida Police Benevolent Association and the Fraternal Order of Police. Such endorsements may certainly be brought to the attention of voters but this brochure went further and actually stated that police officers risk their lives every day and thus "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals . . . behind bars." Again the message was clear, Judge Kinsey touted herself as pro-police and committed to "help law enforcement."

She certainly did not say that she would also help the public defenders appearing in her courtroom. A candidate's pledge of support for either the public defenders or state attorneys in criminal matters would be obviously improper.

We recognize that words such as "impartial" and "criminals" were also used in this campaign brochure and that "fair" and "compassionate" were used in others. However, these few words do not distract from the overall message that with Pat Kinsey "the criminals knew they were in for a rough ride" and that she would

actually "help law enforcement." The distinction between a presumed innocent "defendant" and a convicted "criminal" was never suggested in the written campaign material.

Obviously, a person is not a "criminal" until after he or she is "convicted." This brochure (Exhibit 2) was an ethical violation because it constituted a commitment or promise to act in a particular manner in future criminal cases.

Charge 3 was based upon Exhibit 3 entitled "*Let's Elect Pat Kinsey*." This is the only brochure which was not a part of the series of brochures mailed during the last 18 days of the campaign. Although this brochure, standing alone, is less offensive than the others, when viewed in context along with the other brochures and radio statements it also constituted a similar improper commitment. Again, Pat Kinsey was pictured with police officers along with the pledge that "Pat Kinsey will work with our law enforcement officers..."

Charge 4 concerned a radio interview quoted in part in the charging document. A copy of the entire interview was attached as an exhibit and admitted as JQC Exhibit 8 without objection. (T. 118). The Hearing Panel concludes that a judicial candidate does not have an affirmative duty to disavow all mistaken impressions that citizens and voters might have concerning that candidate. However, there is simply no question as to Judge Kinsey's intentions to portray herself as pro-law enforcement. When the

caller on the radio show stated that he knew she was "pro-law enforcement" he followed up with a question as to whether this constituted bias toward the defense. Judge Kinsey answered by portraying herself as a prosecutor and portraying her opponent as a defense attorney with Judge Green still in the defense mode. The Panel finds that Judge Kinsey's statements did leave the firm and definite impression that even as a judge she would remain in the "prosecution mode." She intentionally contrasted herself, painting Judge Green in the defense mode and herself in the prosecution mode.

The radio interview also included candidate Kinsey's comment:

I work very closely with law enforcement officers as a prosecutor. And they're left, begging for help. And all they see when they come to court is a judge who either dismisses a case or minimizes it by not holding the criminals accountable. So, I have given up my job; I have turned in my badge and gun, as a prosecutor, I have turned in an irrevocable letter of resignation, so I can run for judge because somebody has to do it. Somebody has to hold these criminals accountable. And that is why I am here.

Again, this constituted a very strong statement that Judge Kinsey would assist the police. Obviously, under our system, a defendant is not a criminal until convicted.

The radio interview also contains Judge Kinsey's statement that a judge's responsibility was to be "absolutely a reflection of what the community wants." The Hearing Panel does not agree. We also note that Judge Lacey Collier testified extensively and

without objection that the judiciary is to be independent and is not to be merely a reflection of the desires of the community. (T. 184-5). The Hearing Panel agrees with Judge Collier, a judge has a higher duty of impartiality rather than to merely reflect what the community wants on a particular issue. Substantial precedent and much of our nation's history so indicates. See In re: Code of Judicial Conduct Canons 1, 2 and 7A(1)(b), 603 So. 2d 494 (Fla. 1992); where the Florida Supreme Court quoted Alexander Hamilton and numerous other authorities for the time honored view that judges must remain independent both in office and in the process by which they gain their office. See 603 So. 2d 497, 498.

The above decision at 603 So. 2d 497 is an opinion concerning JQC charges against Judge Hugh Glickstein who publicly endorsed an incumbent Supreme Court Justice in a merit retention election. Judge Glickstein sued the JQC members in circuit court to declare the canons unconstitutional as a deprivation of his rights to free speech. The Supreme Court transferred the circuit court action directly to the Supreme Court to determine the constitutional issues and held the canons constitutional without ruling on the merits of the JQC charges.

Charge 5 asserts eight different examples drawn from campaign language with a concluding assertion that Patricia Kinsey deliberately cloaked her candidacy in an umbrella of law enforcement and intentionally portrayed herself as pro-prosecution

and pro-law enforcement and that she would so act as a judge. The Hearing Panel agrees and concludes that the Kinsey campaign was just such a deliberate and intentional attempt. Charge 5 is drawn from the six brochures and the radio interview and we will not again repeat each of these excerpts.

Judge Kinsey told voters that they could expect her to "bend over backward" in protecting victims. Even if any one of the eight examples in Charge 5 may be individually viewed as insufficient to warrant discipline, the law of JQC proceedings under the clear and convincing evidence standard provides:

Conduct unbecoming a member of the judiciary may be proven by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary.

In re: Kelly, 238 So. 2d 565, 566 (Fla. 1970). Kelly was the first reported JQC case and which occurred over 30 years ago. It has been repeatedly followed in subsequent cases. See In re: Shea, 759 So. 2d 631, 638 (Fla. 2000); In re: Graham, 620 So. 2d 1273, 1275 (Fla. 1993); and In re McAllister, 646 So. 2d 173, 178 (Fla. 1994). Clearly, candidate Kinsey engaged in a pattern of conduct unbecoming a member of the judiciary.

Charge 6 accused Kinsey of knowingly making a false statement and the Hearing Panel concludes that the evidence does not warrant a finding of guilt as to this specific aspect of the brochure which

was JQC Exhibit 4 entitled "*A Vital Message From Law Enforcement.*"

Charge 7 concerned a brochure entitled "*A Shocking Story of Judicial Abuse.*" This brochure was part of the campaign strategy or portraying Judge William Green as demonstrating a shocking lack of compassion for an elderly couple by offering to put them in jail for their own protection from their violent son, Mr. Grover Heller, who was asserted to have been released by Judge Green.

Judge Kinsey has been found guilty in part of this charge. The Hearing Panel concluded, by clear and convincing evidence, that she made a knowing misrepresentation concerning Mr. Heller's bond. In fact, the Heller bond had been revoked and Judge Kinsey knew or should have known it. (T. 121-124).

Charge 8 concerned a 60 second radio spot and although information was omitted from this commercial, the Panel found an absence of guilt under the clear and convincing evidence standard. The Panel concluded that as a brief radio advertisement, all of the facts of the controversy did not have to be included.

Charge 9 is again based on Exhibit 4 and contains an assertion of two different misrepresentations. The Panel finds guilt as to the first allegation only in this charge. The Panel concludes that Kinsey did knowingly misrepresent the nature and seriousness of the criminal charges pending in the State v. Johnson case because the brochure left the clear impression that Johnson had been charged with attempted murder and burglary and no such charges were in fact

pending at the time that he appeared at his bond hearing. This mistake in the campaign brochure was admitted by counsel for Judge Kinsey. (T. 65). Judge Kinsey herself agreed that Mr. Johnson had not been charged with attempted murder at the time of his first appearance. She was asked by her own counsel:

Why did you say in the brochure that Mr. Johnson was charged with attempted murder?

That's the way I thought of that case. That was my case for a very long period of time. And when I read the materials, that's what I saw and that's what I charged. I just didn't even think about the fact that that wasn't the original charge. I don't even remember what the original charge was.

Was it your intent in any way to misrepresent or mislead people that would read this brochure?

No, it was not. (T. 153-4).

Despite this denial of intent, the Panel concludes that there was a knowing misrepresentation as to the charges actually pending against the defendant Johnson. Certainly Assistant State Attorney Kinsey was on notice of the correct charges.

Charge 10 is also based on the "*Vital Message*" brochure and the Panel concludes that the comments regarding defendants Stephen Johnson and Gerard Alsdorf should have been reasonably expected to affect the outcome of their future cases. Judge Kinsey testified that a jury was subsequently selected in the Johnson case and no perspective juror knew of the campaign literature. (T. 135). This

does not dispel the violation because the comments certainly could be expected to affect the outcome of those cases.

Charge 11 asserts misrepresentations as to the incumbent judges nickname and the fact that he consistently ignored the pleas of police officers. Although we certainly consider this kind of name calling to be "bad form," in this case, there was evidence that Judge Green was consistently referred to at least by the police community as "Let 'Em Go Green" and there was substantial evidence that he did ignore the pleas of police officers. (T. 102-4, 302, 373, 397, 444). As previously indicated, there simply was no contrary evidence presented on this point and Judge Green, although available, was not called to testify. The Panel finds Judge Kinsey not guilty of this charge.

Charge 12 asserts that Judge Kinsey engaged in conduct unbecoming a candidate for a judicial post and that her campaign was completely inconsistent with the dignity appropriate to judicial office with the result of bringing the judiciary into disrepute. The Hearing Panel, by clear and convincing evidence, finds that this campaign did convey the false and misleading impression of the Judge's role **SS** particularly in regard to judicial independence and impartiality, in the handling of criminal cases. Judge Kinsey was found not guilty of Charges 5, 8 and 11, but on all other charges (1, 2, 3, 4, 5, 7, 9, and 10), this charge is sustained.

A judicial election is markedly different from a normal political election and is governed by substantially higher standards. In re: Alley, at 1369. Judge Kinsey stated that she recognized these higher standards from the beginning of her campaign and so advised everyone connected with the campaign. (T. 142).

RULINGS ON DEFENSIVE MOTIONS

By prehearing motions, Judge Kinsey asserted two basic arguments. Initially she contended that the content of her brochures and radio excerpts were political speech protected by the First Amendment of the United States Constitution. She further contended that the Canons within the Code of Judicial Conduct were applicable to judicial officers and not to her as a candidate. She asserted this as a reason for much of her conduct during the campaign while at the same time asserting at trial that she was fully aware of and had complied with Florida ethical requirements as stated in In re: Alley. (T. 75, 141, 142).

The Hearing Panel, at trial, announced denial of all of the motions implicitly including a ruling that the restrictions on judicial elections imposed by the applicable Florida Canons did not violate protected free speech and further that the Canons were indeed applicable to Florida judicial candidates. See In re: Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)), 603 So.2d 494 (Fla. 1992) where the Florida Supreme Court specifically held that

Canons 1, 2, and 7 of the Code of Judicial Conduct were constitutional and applicable in a Florida judicial election.

The Preamble to the Florida Code of Judicial Conduct is basic but very informative. It states:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.

* * *

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies.

The Definition section of the Code provides:

A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office.

The state of Florida has a compelling interest in maintaining the actual and apparent independence of the Florida judiciary. Judicial Canons have been held constitutional and proper restrictions on judicial elections throughout this country so long as there are narrowly tailored to accomplish the necessary compelling end. See Broadrick v. Oklahoma, 413 U.S. 601 (1973); Republican Party of Minnesota v. Kelly, 63 F.Supp.2d 967 (D. Minn. 1999) and In the matter of Bybee, 716 N.E. 2d 957 (Ind. 1999).

In the Judge Hugh Glickstein matter at 603 So.2d 494, p. 497, the Florida Supreme Court stated:

Regulations that attempt "to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973).

* * *

Maintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent is a compelling governmental interest. E.g., Morial; Gaulkin; Kaiser.

See: Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978); In re Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976); and In re Kaiser, 111 Wash.2d 275, 759 P.2d 392 (1988), as relied upon by the Florida Supreme Court at 603 So. 2d at p. 497.

The Hearing Panel concludes that Canons 1, 2, 3 and 7 were correctly charged upon and applied herein and further that there has been no unconstitutional restriction on the rights of free speech.

RECOMMENDATIONS

The Panel finds that Judge Kinsey is guilty of serious violations growing out of her campaign in which she was successful in obtaining the position of county court judge. The Panel has no hesitancy in recommending that she be publicly reprimanded by this Court but believes leaving her in office with no further penalty is entirely inappropriate. Under the current Constitution, Judge

Kinsey is subject to removal or further penalty in the form of a fine. The Hearing Panel has thoroughly deliberated this issue and concludes that the penalty imposed here must be sufficient to strongly discourage others from violating the Canons governing contested elections.

At least one member of this Panel strongly urged Judge Kinsey's removal. This Panel member concurs in and would apply the statement of this Court in Alley that: "We find it difficult to allow one guilty of such egregious conduct to retain the benefits of these violations and remain in office."

However, the conduct in Alley was, in the view of the majority of the Hearing Panel, significantly more egregious than the conduct involved in the present case. Judge Alley admitted to intentionally misrepresenting the basic qualifications of her incumbent opponent and in intentionally misrepresenting her own qualifications. She altered a published newspaper to make it appear she had been endorsed by the paper which had actually endorsed her opponent. She intentionally injected party politics into the nonpartisan race. Judge Kinsey's misconduct did not rise to this level.

Despite the less egregious nature of the violations, Judge Kinsey must be punished for her conduct and such conduct simply cannot be tolerated in future elections. While a reprimand alone is insufficient, there was no evidence that Judge Kinsey is presently unfit to hold office other than her misconduct involved

in winning the election. Although such misconduct can rise to the level of present unfitness as is required for removal under Article V, § 12(a)(1), here, the Panel finds the conduct does not warrant removal. Indeed, the Investigative Panel made no direct argument to this Panel that Judge Kinsey should be removed. (T. 45, 570-575). The recommendation of a penalty was left entirely to the Hearing Panel.

Thus under all of the circumstances including the very favorable character evidence, and after due consideration, the Hearing Panel by a vote of at least 4 members recommends that Judge Kinsey be publicly reprimanded and fined the substantial sum of \$50,000.00 plus costs of these proceedings. This amount should be paid within a reasonable time and jurisdiction should be retained by the JQC for purposes of enforcement.

While one Panel member urges removal, another member strongly disagrees with the amount of the fine. This member has been permitted to state a contrary view regarding the fine as follows.

This member states that, although Judge Kinsey crossed certain ethical lines in her election and should be sanctioned for it, the \$50,000.00 fine bears no relation to reality. It is a figured plucked out of thin air, explicitly intended to "be sufficient to strongly discourage others from violating the canons." The fine is approximately 50% of the yearly salary of a county judge and is not based on any evidence of Judge Kinsey's finances nor what hardship

a \$50,000.00 fine would result in. This would be the first fine imposed in a JQC proceeding in Florida and research shows that no other state has imposed a fine of this magnitude. See e.g., Mississippi Commission on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000) (fine of \$1,500 imposed with two Justices dissenting); Mississippi Commission on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999) (\$3,000 fine recommended by Commission but rejected by Court); Mississippi Commission on Judicial Performance v. Jones, 735 So. 2d 385 (Miss. 1999) (\$1,500 fine); Mississippi Commission on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998) (\$1,500 fine); Mississippi Commission on Judicial Performance v. Haltom, 681 So. 2d 1332 (Miss. 1996) (\$4,932.68 fine); Mississippi Commission on Judicial Performance v. Ishee, 627 So. 2d 283 (Miss. 1993) (fine of \$5,600 with one Justice dissenting); In re: Judicial Campaign Complaint Against Kienzle, 708 N.E. 2d 800 (Ohio 1999) (\$1,000 fine); In re: Judicial Campaign Complaint Against Hein, 705 N.E.2d 687 (Ohio 1999) (\$2,500 fine); In re: Judicial Campaign Complaint Against Burick, 705 N.E.2d 422 (Ohio 1999) (\$7,500 fine).

This member agrees that Judge Kinsey should undergo the humiliation of standing before the En Banc Florida Supreme Court for a public reprimand. This is a sufficient disciplinary measure in cases such as this where a majority of the Panel agrees that the judge is not presently unfit to hold office. Indeed, this member

believes Judge Kinsey is salvageable with a bright future in her court.

Finally, this member believes no penalty should be imposed simply to set an example for future judicial candidates. To do so makes the JQC actions appear arbitrary and capricious and does not serve to "...maintain confidence in our legal system." This goal is set out in the Preamble to the Florida Code of Judicial Conduct.

**FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION**

By:

JUDGE HARVEY L. GOLDSTEIN,
Chairman, Hearing Panel,
Florida Judicial Qualifications
Commission
Room 102, The Historic Capitol
Tallahassee, Florida 32399-6000
850/488-1581

Copies furnished in accordance with the attached list.

Roy M. Kinsey, Jr.
Counsel to the Judge
Kinsey, Troxel, Johnson & Walborsky, P.A.
438 East Government Street
Pensacola, Florida 32501

Marvin Barkin
Lancing C. Scriven
Special Counsel
P.O. Box 1102
Tampa, Florida 33601

Thomas C. MacDonald, Jr.
General Counsel
100 N. Tampa Street
Suite 2100
Tampa, Florida 33602

John Beranek
Counsel to the Hearing Panel
Ausley & McMullen
P.O. Box 391
Tallahassee, Florida 32302

Brooke Kennerly
Florida Judicial Qualifications
Commission
Room 102, The Historic Capitol
Tallahassee, Florida 32399-6000

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